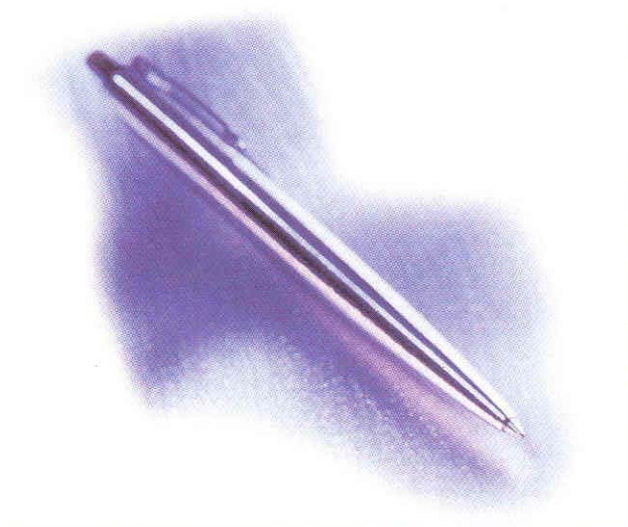


The Islaamic Will



Prepared for www.calltoislam.com

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INTRODUCTION

'The word used in the Qur'aan and the Sunnah to describe a "will" is "Wasiyyah" which linguistically means a command, strict order, a pledge or a promise.

Definition

A 'Wasiyyah' or Will in Islamic terminology is "all instruction a person leaves for tasks to be carried out after his death."

Some scholars specify that Wasiyyah describes the instructions one leaves to donate money after his death and the instructions to his relatives to commit to righteous behaviour. These instructions relate to money left as gifts or grants (Waqf) for certain causes as well as personal decisions one takes to arrange for matters after his death such as caring for his children, funeral and burial arrangements, the marriage of his children, etc.

The Lawfulness of the Will

Scholars are in unanimous agreement that writing a will for one's money to be spent according to his instructions after his death is a lawful (halal) act. There is ample evidence for this ruling in the Qur'aan and the Sunnah. Allaah, subhanahu wa ta'ala, says, **"Ordained for you, when one of you nears death and he leaves behind possession that he makes a will."** [2: 180]. Verse 12 of Surah an-Nisaa explains what a spouse may inherit of the other spouse's money, **"after the settlement of a will or debt."** The same verse discusses the inheritance of a person who has no descendants or ascendants followed by, **"after the settlement of a will or debts."** [4: 12]

The Qur'aan reveals the fact that Islamic law permits the writing of a will in its requirement that a certain number of people witness the writing, **"O you who believe. When death approaches any of you, take witnesses from among yourselves on making your will. They should be two just men from among you, or, if you are on a journey in the land and the affliction of death befalls you, two others from another people."** [5: 106]

The Prophet, sallallahu alayhe wa sallam, said, *"A Muslim should not go to bed for as little as two nights without first having written his will."* (Bukhari) Commenting on this hadeeth in his great Fiqh book, 'al-Mughni,' Ibn Qudamah asserts that all scholars and learned people of all times have agreed to the lawfulness of the will in Islam.

GENERAL PRINCIPLES

The Amount to Be Willed

Preparation of the will should not be kept until the onset of the final signs of death. The Prophet, sallallahu alayhe wa sallam, was asked, "Which donation of money is the best? He replied: *"To donate money while you are fit and well, fearing poverty and hoping for wealth, not to wait until your soul is about to depart, then reveal to whom you wish to donate and to whom you owe money."* (Abu Dawud).

One may will no more than one third of his money unless he has the permission of his heirs to will more. In moderation, the will relates to one quarter, one fifth or one sixth of the money. Saad ibn Abi Waqqas said he asked the Prophet if he may will two thirds of his money for good causes. The Prophet of Allaah replied, *"No."* He had the same answer when he asked about one half of his money and said, *"Only one third, and that is plenty."* (Bukhari) The Prophet, sallallahu alayhe wa sallam, recommended to some of his companions that one fifth of their money be willed to good cause, saying, *"I am content with what Allaah is content with,"* referring to verse 41 of Surah 9, 'al- Anfal', **"And know that whatever spoils you win, a fifth is for Allaah."**

Falsified Will:

The testator of a will should be warned of making a deviant will, in the form of giving false information to prevent some or all of his heirs from receiving the inheritance. Anyone who has knowledge of a will that is built on fabricated information must set it right immediately. For this, he will be rewarded, not punished, for Allaah says: **"But whoever fears that the testator has deviated or been unfair, and then amends the will to set it aright between the parties concerned, there is no sin upon him. Indeed, Allaah is All Forgiving, All-Merciful."** [2: 182]

Changing the Will without Permission:

If a will is consistent with the laws of Islam, it is prohibited for people other than the testator to change it without permission. Allaah the Almighty states, **"So whoever changes the will after hearing it, then the sin is on those who change it. Indeed, Allaah is All-hearing, All-Knowing."** [2:181] At-Tabari said in his Tafseer that "Whoever changes a will that gives good advice to the parents of the deceased and to his relatives who are not heirs, after hearing it, the sin will be on him."

Duties of Writers and Witnesses:

It is the duty of anyone whose task it is to write the will and of the witnesses to make an effort of doing their job well. Words used must be clear and free of ambiguity in order not to have the opposite effect of creating quarrels and problems between the people involved. The writer and the witnesses should explain to the testator - if need be – the difference between funds reserved for a certain good cause and money to be willed. Many people are confused between the two and use the words interchangeably.

Difference between Waqf and Will:

A will is only implemented after the death of the testator, and he may change or revise it at any time during his life. Waqf or reserved funds, on the other hand, can be used immediately for good purposes during the life of a person. Another difference is that one may only will up to one third of his money, whereas one may reserve all or any part of his money for a good cause. Also, the natural heirs do not inherit money in the will, but money placed in reserved funds may be spent on the heirs.

CASES WHEN THE WILL IS...

...Strongly Required:

A Muslim must make a will if he is involved in any kind risk, such as taking a journey, becoming seriously ill, going out to sea, travelling by air or other means which may be unsafe, or going to war.

...Recommended:

A person should make a will to settle what he owes to others, particularly if these debts are unknown to others cannot be proven otherwise. A will should resolve matters related to money, which has been entrusted to the testator (the writer of the will). One should also arrange repay debts owed to Allaah in the will, for example:

- Kaffaraat- deeds which must be performed to Allaah's forgiveness for particular sins.
- Performance of the required Hajj.
- Overdue zakah.

It is necessary in such cases to write the will or get it before some witnesses. This will prevent violation of rights of others and ensure that the heirs do not receive money which is not theirs. For example, the testator might owe some money which he was not able to pay during his life. This must be recorded in some form, so that that the lender or his heirs receive what is rightfully theirs, instead of the money going to the deceased's own family. Writing will also prevent mistakes that could arise because of forgetting the name of the lender or the amount, causing the truth to be buried along with the borrower. This is very common today.

...Preferred:

For Muslims who have a reasonable size of wealth, it is preferred that they will some of it to themselves by assigning some of it as a Sadaqah Jariyah or ongoing charity. This way, they insure themselves continuous reward. The Prophet, sallallahu alayhe wa sallam, told us that: *"When a person dies, all of his actions come to an end with the exception of three things: ongoing service to the needy, an upright child supplicating for his sake, and useful knowledge left to benefit others."* (Muslim)

...Not Preferred:

It is not preferred that a person wills part of his money if the heirs are poor and the inheritance is small. Saad Ibn Abi Waqqas said, *"Leaving your heirs in wealth is better than leaving them as a burden on other people."* (Bukhari). Donating money to distant people at the expense of reducing the money left to needy relatives is not preferred.

...Haram or Prohibited:

Money may not be willed to people who are already legal heirs of any kind to the deceased. The Prophet, sallallahu alayhe wa sallam, said, *"Allaah has made rights for all those who should have rights, so do not will money to an heir."* (Tirmithi and Abu Dawud) In the book,

'Talkheess al- Habeer,' Ibn Hajar confirmed that "The scholars have agreed to observe the hadeeth." The following must be noted:

- With the permission of the adult heirs, the will may be put to effect, based on the hadeeth of the Prophet, sallallahu alayhe wa sallam: "*Nobody receives money willed to him except with the permission of the heirs.*" (Daraqatni). Ibn Habirah said, "That scholars are in agreement that a person may not receive money from a will without the permission of the heirs." The same has also been confirmed by Ibn Hajar.
- It is also prohibited to write a will that is intended to harm anyone in any way, for Allaah says, "**After settlement of a will or debts that no loss is caused (to anyone). This is a command from Allaah.**" [4: 12]. This means that a will should not cause any loss or harm as would be the case if the will falsely accused people of being indebted to the deceased, or if it required the heirs to repay the debts of someone else. Abu Hurairah said, "'A man or a woman may be obedient to Allaah for sixty years, and upon their death, they leave a will which harms others. Their place is in Hell.' At this point, Abu Hurairah recited 'After settlement of a will or debts, which no loss is caused (to anyone). This is a command from Allaah... that is the supreme achievement.' [4: 12]" (Abu Dawud and Tirmithi)

FORMAT OF THE WILL

The following is a model of a will made by some scholars:

In the name of Allaah, the Merciful, the Compassionate.

Peace and prayers be upon The Prophet of Allaah, his kin, friends and all those who have followed his guidance. This is the will of _____ (full name), which was prepared while he was mentally and physically fit and well. (If the testator is ill, he should describe his state at the time of writing the will.) The testator bears witness that there is no deity but Allaah and that Muhammad is the Prophet of Allaah, that Jesus is a messenger and worshipper of Allaah, granted to Mariam and created by Allaah, that heaven, hell and the final day of judgment are absolute truths and that Allaah shall return to life those who now lie in their graves. The testator wills one third of his money (or one quarter or one fifth) to be received by _____ (he mentions exactly how the money is to be spent). He appoints _____ (name of guardian) to act on his behalf in this matter.

No particular format or style of writing has been specified for the will. The testator should be sure to include the following:

1. His physical and mental state of health at the time of writing the will.
2. The testator should affirm his faith, bear witness that he believes that there is no deity other than Allaah and that Muhammad is his messenger, and affirm his belief in heaven, hell, resurrection and judgment day.
3. He should report on his debts, properties and possessions if there are no other documents to show this.
4. The testator should specify the amount or percentage of money he wants to will.
5. He should appoint a guardian to execute his will.
6. The testator should give clear instructions as to how he wants the money to be spent -whether to cover the cost of Hajj, provide water, build a mosque, help the poor and needy, improve education or other generally good causes to be selected by the guardian.
7. If he desires, the testator may select a guardian to care for his minor children and oversee the marriage of his daughters. He should give to his children the same commands given by prophets Ibrahim and Yaqoub to their children -to fear Allaah the Almighty, obey Him, avoid committing sin, adhering to the faith and remaining united.

If the testator does not want to be specific about how the money should be spent, he should explain in the will that this is left for the guardian of the will to decide. This should all be stated very clearly, whether the testator has written the will himself or dictated it to someone. If another person is formulating the will for him, the testator should make his wishes known to him very clearly in order to remove all ambiguity. The testator should also

note to give the same advice to his relatives, siblings and children that was given by Ibrahim and Yaqoub, alayhima salam, to their children, **"O my sons. Allaah has ordained the religion for you, so hold fast to the religion of Islam until death comes to you."** [2: 132]. The testator should command his family to have great fear of Allaah and obey Him in words and actions, whether or not their behaviour is known to others. He should command them to avoid sin, abide by religion, unite under it and make peace with each other. Two Muslims must witness the writing of the will.

ISSUES RELATED TO GUARDIAN

It is preferred that the testator appoint a trusted person to be responsible for gathering all of his possessions, distributing dues, executing the will and caring for his children. This person may or may not be a relative. If the testator dies before appointing someone, one of his heirs may take this responsibility. If this is not possible due to incompetence or family quarrels, or there is no heir, a government leader takes over. A father must appoint someone to take his place in the marriage of his daughters and all relatives are to abide by his decision.

Qualities of the Guardian:

The testator should appoint a mature, just and upright Muslim. He may be one of his children or relatives or any- one else. If that person is incapable of bearing the responsibility alone, or if it is a woman, the help of others may be enlisted.

Accepting the Responsibility:

It is preferred that the person selected, if he is capable and confident, accept the responsibility and prepare for it whether during the life of the testator or after his death. He is doing the testator a big service and performing a great deed. The guardian should not delegate the responsibility to someone else without the permission of the testator. He may abstain, if a government leader can relieve him of his responsibility.

The guardian may not abstain in the following cases:

1. If there is no government leader, as abstaining would be betraying the testator's trust and withholding the rights of Muslims.
2. If the government leader doesn't execute the will for any reason.
3. If the guardian fears that the government leader will delegate the responsibility to people who are not up to it.
4. If the guardian knows that the government leader is corrupt and indifferent to the wills and properties of the Muslims.

These cases would restrict the guardian from delegating his responsibility to a government leader.

Appointment of a Guardian for the Family:

A person who is responsible for others may appoint in his will a guardian to bear his personal responsibilities. For example, a father appoints a guardian to take care of his children or any mentally disadvantaged people or minors in his care. He is to guard their money and invest it in what he sees good for them, giving them what they need of it in moderation. A person of age needs no guardian. A father may also appoint someone to take his place in the marriage of a daughter, whether or not she is a minor, whether she has been married before or not, and whether or not she needs guidance. A father may not instruct his heirs to continue paying his debts after his death using their inheritance. This is

because whatever money they inherit becomes their own, their father having no say in how it is spent.

Family members are not authorized to appoint a guardian in their will to take care of people for whom they are not fully responsible. For example, a mother is not held legally accountable for all the affairs of her children, so she may not appoint a guardian for them in her will since this is not her role to begin with. Only the father has the authority to do so. The same applies for a grandfather with his grandchildren and a brother for his siblings; they may not be the ones to appoint guardians.

Limitations of the Guardian:

The will specifies exactly what is required of the guardian, and the guardian's responsibilities are limited to that. For example, if the guardian is required to distribute one third of the testator's money, he may have no say in the marriage of the testator's daughter. If his job is to care for minors and guard their financial interest, he may not act beyond that.

Multiple Guardians:

A will may appoint different guardians for different tasks. For instance, one person may have the responsibility of distributing the money, another may be responsible for overseeing the marriage of the testator's daughters and a third may have the task of repaying debts. However, giving full responsibility in all affairs to one person may be wiser as it reduces the likelihood of quarrels and conflicts between the guardians.

Being Guardian to a Non-Muslim:

A non-Muslim may appoint a Muslim to act on his behalf in his will, as long as what is required of him is permissible by the laws of Islam. Thus, a Muslim may not be asked to deal in wine and pork etc. On the other hand, a Muslim may not appoint a non-Muslim to execute his will since non-Muslims may not oversee the affairs of Muslims, "And Allaah will never grant the non-believers any advantage over the believers." [4: 141]

Benefiting from the Will

The guardian may be in one of the following positions:

1. The testator has given him specific instructions, in which case he is to follow them to the letter, provided they are abiding by the teachings of Islam.
2. The will has asked the guardian to place the money where he sees best. In this case, the guardian may not take any of the money for himself as this would be seizing possession of what is not his. He may, however, based on honest judgment on his part, give some of the money to needy relatives of his as that would be an act of charity. This includes giving money to his own children, if they are truly in need. It is better, though, to avoid doing this, as the scholars have disagreed on it.

ABSENCE OF A WILL AND HEIRS:

One does not know when or where he will die and it is possible that death pounces unexpectedly, before he has written a will or appointed a guardian to act on his behalf. Or

perhaps, the selected guardian declined the job, there may be no Muslim government or one may die in the wilderness. In such circumstances, any available Muslim is required to take responsibility for the deceased and his possessions. They are to use his money to make funeral arrangements and with the remainder do what is best to preserve the money in those circumstances, possibly by selling possessions or saving the money or delivering it to the heirs, etc. Taking this responsibility is the duty of the Muslims since just leaving the deceased person's money would cause loss. Allaah, subhanahu wa ta'ala, instructs us to, **"Cooperate with all in what is good and pious."** [5:2]. Bearing this responsibility is cooperating with the deceased and his heirs.

CONDITIONS OF THE WILL

Annuling the Will:

A will is annulled if the testator changes his mind about it during his life. Omar said, "A man may change his will however he pleases." This may be done as many times as needed. Ibnul Munther said in his famous book 'al-Ijmaa' that "Scholars have agreed that a man may change all that is in his will." A will is also annulled if the money it relates to becomes no longer available.

In addition, if a person who will receive money from the will dies before the death of the testator, the will is annulled. This is due to the fact that the terms of the will cannot be implemented if a beneficiary is already dead. A will is also annulled if the recipient of money declines to accept it, or if the testator has stated a condition for distribution of the money that is not fulfilled at the time of his death. For example, the testator might have stated that the will should come into effect only if he dies of a certain disease or at a certain time. If these conditions are not fulfilled, the will is annulled (ash-Sharh al-Kabir, v3/p529). Finally, if the testator is killed by the beneficiary of the will, the will becomes invalidated.

Authenticity of the Will:

A testator's own handwriting, as recognized by the heirs, is evidence of the authenticity of the will. Otherwise, the heirs should validate the will by other accepted means.

Having a Witness:

It is preferred that the testator have someone witness the writing of the will, whether he is writing it in person or dictating it to someone.

The Beneficiaries of the Will:

If the will allocates money to a person who is not an heir, as long as it does not exceed one third of the property of the deceased, he should receive it whether or not the heirs agree.

Amount Allocated:

One may will all of one's money or more than one third of it only if he has no legal heirs since the reason for this restriction on the will is to guard the interests of the heirs. If there are no heirs, there would be no reason for this condition. The Prophet, sallallahu alayhe wa sallam, said, "*Leaving your heirs wealthy is better than leaving them as a burden on other people.*" (Bukhari).

Deciding the Status of Heirs:

This decision is to be made at the time of the death of the testator, not at the time of writing the will. The testator may have allocated some money to a person who was not an heir at the time of the writing of the will. If at the time of the testator's death, that beneficiary has become an heir, the will is annulled. For example, the testator may allocate through his will, some money to a grandchild while at the time of the writing of the will, he has no sons of his own. If at the time of his death, he has had a son, but no grandchild, the

money is kept for the grandchild and given to him at birth. This is because the grandchild was not an heir at the time of his grandfather's death. The opposite is also true. The testator may already have a son and grandson at the time of the writing of his will. He may allocate some money to the grandson, who is not an heir. If the son dies before the testator, the grandchild becomes an heir, thus annulling the will since heirs may not receive money in the will.

Priorities in Distribution:

At first all dues must be removed from the estate of the deceased, whether or not they are mentioned in the will. Dues are money which is owed to other people or to Allaah in the form of the cost of the required Hajj, money for kaffaraat, overdue zakah, or any promises that were made to Allaah and not fulfilled during one's life.

Distribution of Estate:

The dues are distributed either by an heir or by a person appointed by the deceased. If both are unavailable then a government appointee should do the job. After all dues are fulfilled, the money in the will is removed. The rest of the money goes to the heirs based on the shares of each heir as specified in the Qur'aan.

Willing a Specific Amount:

If the testator has specified a certain amount of money for the will, his instructions should be followed if the number amounts to no more than one third of his money. If the amount exceeds one third, the beneficiary may only receive one third.

Scope of the Will:

One may only include in the will matters, which are known to be within his scope of concern or duty. The will must therefore be extremely clear and specific to inform the guardian of the will of exactly what is required of him. He should be told in precise terms, for example, that he is to guard the interests of a child or a mentally incompetent person, or repay debts to a certain individual or recover money that had been lent to someone. This is because, much like a power of attorney, the will gives the guardian permission to act on the testator's behalf within the limits of what the testator himself would be able to do if he were alive.

Distributing Money to the Heirs:

The heirs may not receive any of the money in the will, having been excluded from it by the hadeeth: "*A will is not for the heirs.*" (Tirmithi, Nasaa'i and Ahmad)

If the testator has not given the guardian specific instructions as to how to allocate the money, or in case it is impossible to implement the testator instructions, the guardian should spare no effort in seeing that the money is well spent on good causes.

He should go to the government appointee if he encounters any problems in this, as in transferring money, changing the channels of spending, selling the property of a minor or releasing him from responsibility. This is because the government appointee is ultimately responsible for all affairs.

CONCLUSION

It is thus seen the importance of a will. To die without leaving any specified instructions will cause confusion to the living world. We die a death but the action we leave behind will follow our soul. That is why it is eminent that we close the chapter of our life in fear of Allaah, subhanahu wa ta' ala and with dignity and honour. Following Allaah, subhanahu wa ta' ala, and His word is upholding the Truth. May we have the blessing and the insight to prepare a Will with all truth and justice. Let us leave in peace and in the name of Allaah, subhanahu wa ta' ala.

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